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 for this hearing only

**ECF FILED ON 1/04/10**

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

In Re:	)	BK-S-07-11730-LBR
	)	Chapter 13
<b>IRENE MICHELLE SCHWARTZ-TALLARD,</b>	)	
	)	
	)	
Debtor(s)	)	DATE: 01-07-10
	)	TIME: 1:30 P.M.

**PRETRIAL BRIEF IN SUPPORT OF MOTION FOR CONTEMPT FOR  
 VIOLATION OF THE AUTOMATIC STAY**

Comes Now, Debtor, IRENE MICHELLE SCHWARTZ-TALLARD,  
 (hereinafter "Debtor" or "Schwartz-Tallard") by and through her  
 attorney for this hearing only, CHRISTOPHER P. BURKE, ESQ. with  
 her Pretrial Brief in Support of Motion for Contempt for Violation  
 of the Automatic Stay against AMERICA'S SERVICING COMPANY,  
 (hereinafter "A.S.C.").

**I  
 FACTS**

Debtor filed Chapter 13 March 30, 2007. Debtor's case was  
 confirmed on July 3, 2007. (Dkt.#20). On February 27, 2009 ASC  
 filed a Motion for Relief from Stay on Debtors home located at 17  
 Caprington Rd., Henderson, Nevada 89052, (hereinafter "Home").

1 (Dkt.#46). On the documents attached to ASC's Motion the lender  
2 is listed as Soma Financial (hereinafter "Soma"). Ironically, ASC  
3 did not provide how it was a real party in interest with standing  
4 to bring said motion. F.R.B.P. 7017(a).

5 ASC's Motion alleged Debtor had failed to pay her January  
6 2009 and February, 2009 mortgage payments (Dkt.#46, Mot.for  
7 Rel.pg.2,ln.20). In addition, ASC's Motion stated approximately  
8 \$528,000.00 was owed to them and the Home's value was \$605,000.00  
9 (Dkt.#46,MRS.pg.3,ln.3). Yet ASC's Motion seeks relief,  
10 erroneously stating "less ten percent (10%) cost of marketing. .  
11 .resulting in insufficient equity" in the Home.  
12 (Dkt.#46,pg.3,ln.3-4).

13 At the March 25, 2009 hearing ASC's motion was granted. The  
14 Order was entered on April 6, 2009. (Dkt.#55).

15 The Order provided the secured creditor shall give Debtors at  
16 least five-business day's notice of the time, place and date of  
17 sale. (Dkt.55,pg.3,ln.1-2).

18 On May 6, 2009 Debtor, through her new attorney Barry  
19 Levinson (hereinafter "Levinson"), filed a Motion to Reinstate  
20 Automatic Stay (hereinafter "Mot.to Reinstate"). (Dkt.# 59).  
21 Debtors Order Shortening on Motion to Reinstate provided that a  
22 pending foreclosure sale was set for May 20, 2009 at 10:00 a.m.  
23 (Dkt.#60,pg.1,ln.19).

24 Debtors Mot. to Reinstate, provided proof of her October,  
25 2008 through March, 2009 mortgage payments. Tellingly, Debtors  
26 January, 2009 payment was cashed by ASC on January 26, 2009. Not  
27 surprisingly, Debtors February, 2009 payment was cashed by ASC on

1 February 26, 2009 the day before, it filed its Motion for Relief  
2 Stay. Then, Debtors March, 2009 payment was cashed March 25, 2009  
3 the day the Motion for Relief was heard! Debtor attempted to pay  
4 the April, 2009 payment, but it was sent back to her on April 23,  
5 2009.

6 Debtors Motion to Reinstate was heard on May 13, 2009. ASC  
7 did not oppose that Motion and the Bankruptcy Court granted it.  
8 An Order was apparently uploaded on May 28, 2009 and entered on  
9 the Docket June 3, 2009 (Dkt.#65). That Order provided "the  
10 automatic stay is reinstated as of the date of the hearing".  
11 (Dkt.#65,pg.2,ln.1).

12 On May 28, 2009 prior to Debtors Order being entered Debtors  
13 received a "Three Day Notice to Quit". The Notice further  
14 provided a "Trustee's sale on the above property was held on May  
15 20, 2009". (Dkt.#66,pg.2,ln.14).

16 On June 1, 2009 Debtors counsel Levinson sent a certified  
17 letter to ASC's counsel Greg Wilde, Esq. ("Wilde"), informing him  
18 that the automatic stay was violated. On June 9, 2009 Debtor  
19 filed a Motion for Sanctions for Willful Violation of the  
20 Automatic Stay and for attorney fees. (Dkt.#66).

21 ASC opposed Debtors Motion, and filed a Counter Motion for  
22 Sanctions against Debtors counsel under Federal Rule of Bankruptcy  
23 Procedure 9011. (Dkt.#71,#73).

24 The hearing on Debtors Motion for Willful Violation of the  
25 Automatic Stay has been continued a number of times as Levinson  
26 sought to withdraw from the case. Currently Debtors have new  
27 counsel in Christopher P. Burke, Esq. for this hearing only.

II  
ARGUMENT  
A

AN ORDER IS VALID WHEN SPOKEN

Neither the Federal Rules of Civil Procedure, nor the Federal Rules of Bankruptcy Procedure provide that orders are only effective when they are docketed by the clerk. In the Ninth Circuit, an oral order can be valid, especially when a creditor "clearly had notice of its existence and . . . understood and accepted the order as final for purposes of appeal." Commissioner v. Noli, 860 F.2d 1521,1525(9<sup>th</sup> Cir.1988). As one Court held "[a]n oral order of temporary injunction is just as effective as the signing of a written order." Ex Parte Barnes, 581 S.W.2d 812,814(Ct.Civ.App.Tex1979).

In a case directly on point, a Bankruptcy Court held that its oral order granting the debtor's motion to reinstate the stay, was effective when made and immediately resurrected the automatic stay. Thus, the post hearing foreclosure sale was void, as it was in violation of the oral order and automatic stay. In re Nail, 195 B.R. 922,930-32(Bankr.N.D.Ala.1996). In answering its own question, the Court asked "[M]ay a debtor rely on the courts' oral ruling? If a debtor cannot, how can the debtor protect whatever rights are available." Nails at 930 fn.11.

Besides the Ninth Circuit, other Circuits are in agreement that an oral order is valid when spoken. For instance, the Fifth Circuit upheld a bankruptcy court's written order, retroactive to the date of its prior oral order. In re MortgageAmerica Corp.,

1 831 F.2d 97,99(5<sup>th</sup> Cir.1987)(later written order must make clear  
2 the effective date). Similar holdings can be found in the Third  
3 and Sixth circuits. See Bethlehem Mines Corp. v. United Mine  
4 Workers, 476 F.2d 860, 862-64 (3d.Cir.1973) (affirming a finding  
5 of contempt against a party which had disobeyed an orally entered  
6 T.R.O.); In re La Marre, 494 F.2d 753, 758 (6<sup>th</sup> Cir.1974)(noting  
7 that an order "entered in open Court in the presence of the  
8 person concerned or with his knowledge" can be enforced by  
9 criminal contempt proceedings.)

10  
11 **B**  
12 **STAY VIOLATION**

13 Amongst other protections, the automatic stay prohibits the  
14 commencement or continuation of a proceeding against the debtor,  
15 any act to obtain possession or control of property of the estate,  
16 and any act to enforce a lien against property of the estate or  
17 the debtor. See 11 U.S.C. §362(a)(1),(3),(4) and (5).

18 ASC violated the stay by foreclosing on Debtors home after  
19 the stay was reinstated. 11 U.S.C. §362(a). Ironically, ASC has  
20 continued to send mortgage collection statements to Debtor after  
21 foreclosing.

22 **C**  
23 **DAMAGES**

24 Willful is defined as a deliberate act done with the  
25 knowledge that the act is in violation of the automatic stay. In  
26 re Forty-Eight Insulation, Inc., 54 B.R. 905,909 (Bkrptcy  
27 N.D.Ill.1985); In re Allen, 83 B.R. 678(Bkrptcy E.D.Penn.1987).

1 A creditor's violation of the stay is willful even if the  
2 creditor believed itself justified in taking action found to be  
3 violative of the stay. In re Tel-A-Communications Consultants,  
4 Inc., 50 B.R. 250,254 (Bkrptcy D.Conn.1985). The fact that a  
5 creditor acted in good faith in violating the automatic stay is  
6 not a defense. In re Stainton, 139 b.R. 232(9<sup>th</sup> Cir.B.A.P.1992).

7 The Ninth Circuit elaborated on the term "willful" in the  
8 context of 11 U.S.C. §362(h), In re Pinkstaff, 974 F.2d 113(9<sup>th</sup>  
9 Cir.1992). "A 'willfull violation' does not require a specific  
10 intent to violate the automatic stay. Rather, the statute  
11 provides for damages upon a finding that the defendant's actions  
12 which violated the stay were intentional. Whether the party  
13 believes in good faith that it had a right to the property is not  
14 relevant to whether the act was 'willful' or whether compensation  
15 must be awarded. Id at 115. See also In re Bloom, 875 F.2d  
16 224,227(9<sup>th</sup> Cir.1989); In re Carroll, 903 F.2d 1266,1272(9<sup>th</sup>  
17 Cir.1990).

18 If the stay was willfully violated, the Bankruptcy Court can  
19 impose damages, sanctions and attorney fees. 11 U.S.C. §362(k).  
20 Debtor has suffered anxiety, humiliation, medical expenses and  
21 loss of income. The Ninth Circuit allows for emotional distress  
22 damages. See In re Dawson, 390 F.3d 1139(9<sup>th</sup> Cir.2005). On  
23 remand, in a case not unlike this one, Mr. Dawson was awarded  
24 \$20,000.00 for emotional distress where a reasonable person  
25 similarly situated would have suffered serious emotional distress,  
26 when the bank did not rescind the foreclosure for five (5) months.  
27 In re Dawson, 346 B.R.503(N.D.Cal.2006).

1 Some other examples include, In re Bolen, 295 B.R. 803,812  
 2 (Bkrptcy.D.S.C.2002), (\$23,350.00 for willful violation of the  
 3 stay), In re Diviney, 225 B.R. 762,778 (10<sup>th</sup>  
 4 Cir.B.A.P.1998)(affirming \$40,000.00 punitive damages),  
 5 Progressive Motors v. Frazier, 220 B.R. 476,479 (D.Ut.  
 6 1998)(affirming \$20,000.00 punitive damages), In re Meeks, 260  
 7 B.R. 46,48 (Bkrptcy. M.D.Fla.2000)(punitive damages \$35,000.00).

8  
 9 **D**  
**RULE 9011(B)(3)**  
**FILING A MOTION WITH FALSE FACTS**

10 Under F.R.B.P.9011(b)(3) when a party files a motion it "is  
 11 certifying that to the best of that persons knowledge,  
 12 information, and belief formed after an inquiry," that "the  
 13 allegations and other factual contentions have evidentiary  
 14 support."

15 ASC filed a Motion for Relief without providing proof it was  
 16 a real party in interest. ASC filed its Motion, eventhough it was  
 17 accepting Debtor's mortgage payments at that time. ASC filed its  
 18 motion when Debtor was current. ASC even accepted a mortgage  
 19 payment the day of the Motion for Relief hearing. Finally, ASC  
 20 foreclosed on Debtors home, after the Court orally reinstated the  
 21 stay on May 13, 2009. The Bankruptcy Court on its own Motion, can  
 22 hold a separate hearing and impose sanctions under Rule  
 23 9011(c)(1)(B), if Rule 9011(b) is violated.

24  
 25 **II**  
**ISSUES**

26  
 27 1. The Bankruptcy Court orally reinstated the automatic  
 28

1 stay. But ASC violated the stay by foreclosing on Schwartz home,  
2 because the written order had not yet been signed. Should ASC be  
3 allowed to ignore the Courts oral order?

4 2. Did ASC violate Rule 9011(b) by filing a motion for  
5 relief, without proof it was a real party in interest?

6 3. Did ASC violate Rule 9011(b) by filing a motion for  
7 relief when Debtor was current on her monthly mortgage?

8 4. Did ASC violate Rule 9011(b) by accepting a mortgage  
9 payment the day of the hearing?

10  
11 **IV**  
12 **WITNESS**

- 13 1) Irene Schwartz Tallard  
14 2) Ken Schwartz  
15 3) Barry Levison, Esq.  
16 4) Michael Terry, Esq.  
17 5) Greg Wilde, Esq.  
18 6) Any and all ASC witnesses.

19 Schwartz reserves the right to amend her list of witnesses.

20  
21 **V**  
22 **EXHIBITS**

- 23 1) Entire Docket.  
24 2) Three day notice to quit.  
25 3) Notice of new ownership.  
26 4) Clark County recorder list of property owners.  
27 5) Transcripts.  
28 6) Checks of mortgage payments.



1 7) Bank Statements.

2 8) ASC bill for mortgage.

3 9) Medical bills.

4 10) Any and all ASC Exhibits.

5 Schwartz reserves the right to supplement her Exhibits.

6  
7 **VI**  
8 **CONCLUSION**

9 ASC violated the automatic stay by foreclosure on Debtors  
10 home after the Bankruptcy Court reinstated the stay. ASC should  
11 pay damages, fees cost and attorney fees.

12 DATED this 4<sup>th</sup> day of January, 2010.

13  
14 Respectfully submitted,

15 /S/CHRISTOPHER P. BURKE, ESQ.  
16 CHRISTOPHER P. BURKE, ESQ.  
17 Attorney for Debtor(s)  
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